

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTHEW ROBERT MILLER,) NO. SACV 06-00574 VBF (SS)
Petitioner,) ORDER ADOPTING FINDINGS,
v.) CONCLUSIONS, AND RECOMMENDATIONS OF
BRENDA CASH, Acting Warden,) UNITED STATES MAGISTRATE JUDGE
Respondent.)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, and Petitioner's untimely Objections.¹ After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and adopts the findings and conclusions of the Magistrate Judge. However, the Court addresses Petitioner's Objections below.

¹ Petitioner's Objections were initially due on November 1, 2010. The Magistrate Judge granted both of Petitioner's requests for extension of time and extended the deadline to file Objections until November 15, 2010. Petitioner's counsel did not file Objections until November 17, 2010.

1 In his Objections to the Report, Petitioner asserts for the first
 2 time that he is entitled to statutory tolling because his 360 day delay
 3 in filing his only state habeas petition was justified by his counsel
 4 "perform[ing] substantial investigation." (Declaration of Counsel at
 5 2, ¶ 10).² Specifically, Petitioner's counsel states that he "had [his]
 6 investigator contact all witnesses who were identified in the police
 7 reports and [he] visited the crime scene personally." (*Id.*). These
 8 vague assertions fail to justify a 360 day delay in filing Petitioner's
 9 state habeas petition.

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 11 "A petitioner does not meet his or her burden simply by alleging
 12 in general terms [that the delay was justified], or by producing a
 13 declaration from present or former counsel to that general effect." In
 14 re Robbins, 18 Cal. 4th 770, 787, 77 Cal. Rptr. 2d 153 (1998). Rather,
 15 a petitioner "must allege, with specificity, facts showing
 16 [justification for the delay]--and he or she bears the burden of
 17 establishing, through those specific allegations[,] . . . absence of
 18 substantial delay." *Id.*

21 ² On July 30, 2010, the Magistrate Judge specifically directed
 22 Petitioner to file a response stating "any reason that he may be
 23 entitled to statutory or equitable tolling." (July 30, 2005 Order to
 24 Show Cause at 5). Despite two extensions of time and the passage of
 25 several months, Petitioner never filed a response to the Magistrate
 26 Judge's Order to Show Cause. Because Petitioner now raises factual
 27 allegations regarding his entitlement to statutory tolling for the first
 28 time in his Objections, the Court has discretion not to consider this
 new evidence. See, e.g., United States v. Howell, 231 F.3d 615, 621
 (9th Cir. 2000) ("[W]e conclude that a district court has discretion,
 but is not required, to consider evidence presented for the first time
 in a party's objection to a magistrate judge's recommendation.").
 Regardless, Petitioner's new factual allegations do not entitle him to
 statutory tolling, as explained below.

1 Here, counsel's declaration is insufficient to justify Petitioner's
2 360 day delay from the date his conviction became final. As an initial
3 matter, Petitioner's counsel fails to explain why it was necessary to
4 "interview all witnesses identified in the police report" or to "visit
5 the crime scene" given that Petitioner's only claim in his state habeas
6 petition was that the trial court's admission of hearsay evidence
7 violated his rights under Crawford v. Washington, 541 U.S. 36, 124 S.
8 Ct. 1354, 158 L. Ed. 2d 177 (2004). (See Lodgment 8, Petition for Writ
9 of Habeas Corpus ("Lodgment 8") at 2). Moreover, Petitioner fails to
10 explain why he waited four years to investigate potential claims until
11 his conviction became final and why that investigation took 360
12 additional days. (See Declaration of Counsel at 1-3).

13
14 California law measures the length of delay in filing a habeas
15 petition "from the time a petitioner becomes aware of the grounds on
16 which he seeks relief" and "[t]hat time may be as early as the date of
17 conviction." In re Clark, 5 Cal. 4th 750, 765 n.5, 21 Cal. Rptr. 2d 509
18 (1993). Here, Petitioner was certainly aware of the grounds on which
19 he sought relief since the date on which the Supreme Court issued its
20 opinion in Crawford, March 8, 2004, if not before. Because Petitioner
21 was aware of the grounds for his petition over one year and five months
22 before he filed his only state habeas petition on September 2, 2005, the
23 Court concludes that Petitioner's delay was unreasonable. See In re
24 Clark, 5 Cal. 4th 750, 765 n.5, 21 Cal. Rptr. 2d 509 (1993) ("Although
25 delayed presentation to enable the petitioner to file a habeas corpus
26 petition with the opening brief on appeal has been permitted, a petition
27 should be filed as promptly as the circumstances allow, and the
28 petitioner must point to particular circumstances sufficient to justify

1 substantial delay . . ." (internal quotation marks omitted, ellipses in
2 original)); id. at 782 ("Stankewitz refutes any suggestion that the
3 petitioner could delay filing the petition until the judgment was
4 affirmed."). Accordingly, Petitioner's state habeas petition was
5 untimely and does not provide statutory tolling.

6

7 Petitioner also contends that he is entitled to equitable tolling
8 pursuant to Harris v. Carter, 515 F.3d 1051 (9th Cir. 2008). (See
9 Objections at 4). In Harris, the Ninth Circuit held that a petitioner
10 was entitled to equitable tolling because he "relied in good faith on
11 then-binding circuit precedent in making his tactical decision to delay
12 filing a federal habeas petition." Harris, 515 F.3d at 1055.
13 Specifically, the petitioner in Harris waited over fifteen months to
14 file his federal habeas petition because he was pursuing collateral
15 relief in the state courts. See id. at 1053. Pursuant to then-binding
16 circuit precedent, a state habeas petition provided statutory tolling
17 even if the petition was untimely under state law. See id. However,
18 in Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669
19 (2005), the Supreme Court rejected the Ninth Circuit's rule and held
20 that a state habeas petition does not provide statutory tolling if it
21 is untimely under state law. See Pace, 544 U.S. at 417. In Harris, the
22 petitioner's state habeas petitions were untimely under state law and
23 therefore did not provide statutory tolling pursuant to Pace. See
24 Harris, 515 F.3d at 1053. The Ninth Circuit reasoned that the
25 petitioner was entitled to equitable tolling because his federal habeas
26 petition "became time-barred the moment that Pace was decided." Id. at
27 1056.

1 Here, Petitioner contends that he is entitled to equitable tolling
2 because he "relied on what he reasonably believed to be the state of the
3 law in this District and Circuit when he decided to exhaust his new
4 issues in state court prior to filing his federal petition." (Objections at 14). Specifically, Petitioner asserts that he
5 "reasonably relied on the state of the law when he filed his last state
6 habeas petition for the proposition that even if it was denied on
7 timeliness grounds, it was 'properly filed.'" (Id. at 11). However,
8 Petitioner's equitable tolling argument is foreclosed by the recent
9 Ninth Circuit opinion in Lakey v. Hickman, __F.3d __, 2011 WL 13922 (9th
10 Cir. Jan. 5, 2011). In Lakey, the Ninth Circuit held that a habeas
11 petitioner who delayed filing his federal habeas petition because of
12 reliance on the state of the law prior to Pace was only entitled to
13 equitable tolling until April 27, 2005, the date the Supreme Court
14 issued Pace. See Lakey, 2011 WL 13922, at *4 ("Once Pace was decided,
15 [the petitioner] had notice that [our prior precedent] had been
16 overruled and that [statutory] tolling would be unavailable if his state
17 petition was denied as untimely."). The Ninth Circuit also pointed out
18 that "Pace explicitly advised state prisoners, such as [the petitioner],
19 to file a protective federal petition to avoid a possible timeliness
20 bar." Id.; see also Pace, 544 U.S. at 416 ("A prisoner seeking state
21 postconviction relief might avoid this predicament, however, by filing
22 a 'protective' petition in federal court and asking the federal court
23 to stay and abey the federal habeas proceedings until state remedies are
24 exhausted."). As Pace was issued on April 27, 2005, months before
25 Petitioner filed his September 2, 2005 state habeas petition,
26 Petitioner's counsel knew or should have known that the law had changed
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28

1 and that he could not rely on the pre-Pace state of the law.
2 Accordingly, Petitioner is not entitled to equitable tolling.
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4 Even assuming that Petitioner was entitled to equitable tolling up
5 to the date that the Supreme Court issued Pace on April 27, 2005,
6 Petitioner did not file the instant Petition until June 23, 2006, 422
7 days later. Thus, the Petition would still be untimely. The Ninth
8 Circuit has recognized "the harshness" of the rule in Pace, but
9 Petitioner could have avoided "this predicament" by filing a protective
10 petition in federal court instead of waiting for the outcome of his
11 state habeas petition. Bonner v. Carey, 425 F.3d 1145, 1149 & n.20 (9th
12 Cir. 2005) (discussing Pace).
13

14 **IT IS ORDERED** that the Petition is denied and Judgment shall be
15 entered dismissing this action with prejudice.
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17 **IT IS FURTHER ORDERED** that the Clerk serve copies of this Order and
18 the Judgment herein on counsel for Petitioner and counsel for
19 Respondent.
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21 **LET JUDGMENT BE ENTERED ACCORDINGLY.**
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23 DATED: February 6, 2011
24

Valerie Baker Fairbank

25 VALERIE BAKER FAIRBANK
UNITED STATES DISTRICT JUDGE
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